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In The

Supreme Court of The United States

October Term, 1930.

No. 464

RAILROAD COMMISSION OF WISCONSIN, LEWIS E. GETTLE, ADOLPH KANNEBERG and A. R. McDONALD, as members thereof, and JOHN W. REYNOLDS, as ATTORNEY GENERAL FOR THE STATE OF WISCONSIN,

Defendants and Appellants,

vs.

W. G. MAXCY, as Receiver of the Washburn Water Works Company, a Wisconsin Corporation, and WASHBURN WATER WORKS COMPANY, a Wisconsin Corporation,

Plaintiffs and Appellees.

Statement as to Jurisdiction of The Supreme Court of The United States.

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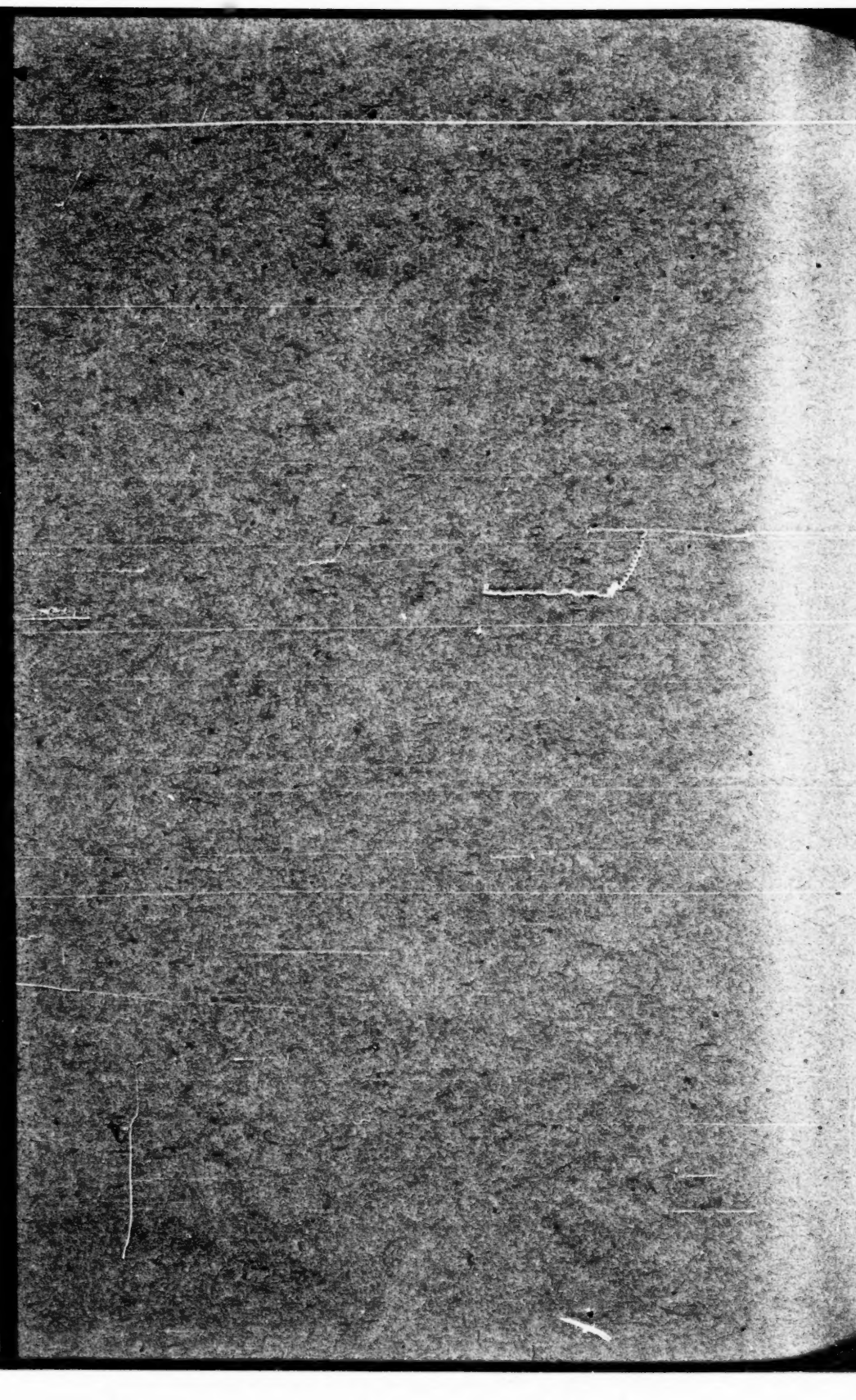

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Statement as to Jurisdiction of The Supreme Court of The United States.

In compliance with Rule 12 of the Supreme Court of the United States, the defendants and appellants submit their statement disclosing the basis on which it is contended that the Supreme Court of the United States has

jurisdiction to review on appeal the decree entered by the District Court of the United States for the Western District of Wisconsin, in favor of the plaintiffs and appellees, and against the defendants and appellants.

I.

Statutory Provisions Relied on to Sustain Jurisdiction of the Supreme Court of the United States.

Defendants and appellants contend that Section 345 and 380 of Title 28, United States Code (Sections 238 and 266, Judicial Code), sustain the jurisdiction of the Supreme Court of the United States on this appeal. These sections provide as follows:

Section 345 (Section 238, Judicial Code, as amended by Act of February 13, 1925, 43 St. at L. 936):

> "A direct review of the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections and not otherwise.
> * * * * *
> (3) Section 380 of this title.
> * * * * *"

Section 380 (Section 266, Judicial Code, as amended by Act of February 13, 1925, 43 St. at L. 936):

> "No interlocutory injunction suspending or restraining the enforcement, operation or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge

thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: Provided, however, That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: Provided, That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall

have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

II.

Date of Decree Sought to be Reviewed and Date on which Application for Appeal was Presented.

The decree which the appellants seek to have reviewed by the Supreme Court of the United States, was signed by G. T. Page, Circuit Judge, F. A. Geiger and C. Z. Luse, District Judges, on the 2nd day of July, 1930, and filed on the 5th day of July, 1930 (Record, pages 93-105). The petition for appeal was presented and allowed on August 22, 1930, and filed on August 29, 1930 (Record, pages 106-107).

III.

Nature of the Case is such as to Bring It within the Provisions of Section 266 of the Judicial Code.

The Washburn Water Works Company is a duly organized and existing corporation, engaged in the public utility business in the city of Washburn, State of Wisconsin, and furnishes water to the inhabitants of the said city of Washburn, Wisconsin (Record, pages 5, 29). The plaintiff, W. G. Maxcy, is the duly appointed, qualified and acting receiver of the Washburn Water Works Company (Record, page 5). On December 4, 1928, the Railroad Commission of Wisconsin entered an order fixing the rates to be charged by the plaintiff W. G. Maxcy, as receiver for the Washburn Water Work Company (Record, pages 48-52). On January 2, 1929, the plaintiffs filed their bill of complaint in equity in the District Court of the United States for the Western District of Wisconsin, in which it is alleged that the rates established by the said order of the Railroad Commission dated December 4, 1928, are confiscatory; that said order deprives the plaintiffs of their property without due process of law and denies the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States (Record, page 5).

The bill of complaint prays that the court grant a temporary restraining order, restraining and enjoining the defendants Railroad Commission of Wisconsin, Lewis E. Gettle, Adolph Kanneberg and A. R. McDonald, as members thereof, and John W. Reynolds as Attorney General of the State of Wisconsin, and their respective successors in office, (a) from enforcing or attempting to enforce against the plaintiffs the said order of the Com-

mission dated December 4th, 1928; (b) from interfering or attempting to interfere with the plaintiffs in charging, collecting and enforcing the rates set out in the schedule marked Exhibit "D" attached to the bill of complaint; (c) from instituting, authorizing or directing the institution of, any suit, action or actions against the plaintiffs, their agents or employes for the recovery or enforcement of any penalty under or by virtue of the statutes of the State of Wisconsin by reason of the charging, collecting and enforcing by the plaintiffs of the rates provided in Exhibit "D" attached to the bill of complaint (Record, page 27).

The bill of complaint further prays that pending final hearing in the case, a temporary injunction be issued upon such notice and after such hearing as the court may deem proper, and as by law provided, restraining and enjoining the defendants, and each of them, and their successors in office, in the same manner as hereinbefore set forth in the plaintiffs' prayer for a temporary restraining order (Record, page 28).

Further, the bill of complaint prays that upon final hearing of the case, the court issue its permanent injunction, restraining the defendants from interfering or attempting to interfere with the plaintiffs in charging, collecting and enforcing in the city of Washburn, the rates filed with the Railroad Commission on December 12, 1927, or such reasonable and adequate rates as shall be established upon the final hearing and trial of the case (Record, page 28).

On January 3, 1929, the District Court of the United States for the Western District of Wisconsin, the Honorable C. Z. Luse, District Judge, granted a temporary restraining order, as prayed for in the bill of complaint (Record, pages 60-62). On January 12, 1929, an order

was entered by the district court, Honorable C. Z. Luse, District Judge, extending the said temporary restraining order for successive ten day periods until such time as the services of two additional judges to hear the application for temporary injunction could be secured (Record, pages 65-66). Thereafter and on the 22nd day of March, 1929, a hearing on the temporary injunction was had before the Honorable G. T. Page, Circuit Judge, the Honorable F. A. Geiger, District Judge, and the Honorable C. Z. Luse, District Judge, pursuant to the provisions of Section 266 of the Judicial Code, and at said time said cause was adjourned to April 5, 1929 (Record, page 115). On the 5th day of April, 1929, a hearing and trial was had before the three judges last named, and on the 5th day of April, 1929, the said judges, the Honorable G. T. Page, Circuit Judge, the Honorable F. A. Geiger, District Judge, and the Honorable C. Z. Luse, District Judge, signed a decree permanently enjoining the defendants, Railroad Commission of Wisconsin, Lewis E. Gettle, Adolph Kanneberg, and A. R. McDonald, as members thereof, and John W. Reynolds, as Attorney General of the State of Wisconsin, from taking any steps to enforce the order of the Railroad Commission dated December 4, 1928, and permanently restraining and enjoining the said defendants from taking any steps whatever to require the plaintiffs to charge the rates prescribed by the said order of the Railroad Commission dated December 4, 1928, or to carry out any of the directions contained in the said order, and permanently enjoining and restraining the defendants from interfering with the plaintiffs in charging adequate and reasonable rates yielding a fair and adequate return upon the value of the plaintiff's property used and useful in connection with the

plaintiff's business as a public water works utility at Washburn, Wisconsin.

An appeal was taken from the decree dated April 5, 1929, to the United States Supreme Court which reversed said decree and remanded the cause to the statutory three judge district court for findings of fact and conclusions of law and to enter a decree thereon. *77 Law Ed. Adv. Op. 337.*

Findings of fact and conclusions of law and decree, pursuant to said mandate, were signed on the 2nd day of July, 1930, and filed on the 5th day of July, 1930 (Record, pages 93-105).

It appears from the foregoing recital that an application was made to the District Court of the United States for the Western District of Wisconsin for a temporary restraining order, a temporary injunction pending the trial, and a permanent injunction restraining the defendants, as state officers, from enforcing or executing an order made by an administrative board acting under and pursuant to the statutes of the state of Wisconsin. A temporary restraining order was granted, a hearing was had on the application for a temporary injunction by three judges, and a final decree was entered by three judges, granting a permanent injunction. The appeal, therefore, is one which is governed by the provisions of Section 266 of the Judicial Code.

IV.

Cases Sustaining Jurisdiction of the Supreme Court of the United States to Review on Appeal the Decree Below.

The decisions of this court fully sustain the contention of the defendants that the Supreme Court of the United States has jurisdiction to review on appeal the decree below.

The question as to whether the provisions of Section 266 of the Judicial Code govern a suit to set aside an order of an administrative body, entered under and pursuant to the statutes of a State, where no claim was made that the statute authorizing the order was unconstitutional, was raised in *Oklahoma Natural Gas Company vs. Russell*, 261 U. S. 290, 293. The court held that such suit was, in fact, governed by Section 266 of the Judicial Code. This decision was followed in *Prendergast vs. New York Teleph. Co.*, 262 U. S. 43, 47, and in *Moore vs. Fidelity & Deposit Co.*, 272 U. S. 317, 320.

In the case at bar no claim is made by the plaintiffs that the statutes authorizing the Railroad Commission of Wisconsin are invalid and unconstitutional. Nevertheless, as was held in the above cited cases, this case is governed by Section 266 of the Judicial Code.

The requirements of Section 266 of the Judicial Code relating to a direct appeal to the Supreme Court of the United States from a decree entered in the District Court of the United States are satisfied where the suit is brought to restrain the enforcement or execution, by the proper state officers, of an order of an administrative body, entered pursuant to the statutes of a state, on the ground that the order violates the Constitution of the

United States; where the bill of complaint prays a temporary restraining order, a temporary injunction pending trial, and a permanent injunction; where a hearing is had on the temporary injunction, before the statutory court of three judges; where, after trial, before the statutory court of three judges, a final decree is rendered by the three judges granting a permanent injunction.

Ex parte Buder, 271 U. S. 461, 465;
Moore vs. Fidelity & Deposit Co., et al., 272 U. S. 317, 321;
Smith vs. Wilson, 273 U. S. 388, 390;
Clark vs. Poor, 274 U. S. 552, 556;
Interstate Busses Corp. vs. Blodgett, 276 U. S. 245, 249.

As pointed out in the third subdivision of this statement, the plaintiffs instituted a suit to restrain the enforcement and execution by the defendants of an order of the Railroad Commission, dated December 4, 1928, on the ground that the said order violated the Constitution of the United States. The bill of complaint prayed for a temporary restraining order, a temporary injunction, and a permanent injunction. A temporary restraining order was granted, a hearing was had on the application for a temporary injunction before the three judges, a trial was had before the three judges resulting in a decree granting a permanent injunction. This case, therefore, falls squarely within the principles established in the foregoing decisions.

This court has heretofore passed upon the question of jurisdiction to determine this appeal, in a memorandum decision handed down under date of October 28, 1929, where it was held that proper jurisdiction had been shown. *74 Law Ed. Adv. Op. p. 104.* In reviewing the

decision of the lower court upon the first appeal in this case, no question was raised as to the jurisdiction of the court. *74 Law Ed. Adv. Op. 337.*

It is respectfully submitted that the Supreme Court of the United States has jurisdiction to review the decree entered by the District Court of the United States for the Western District of Wisconsin in this suit.

Respectfully submitted,

JOHN W. REYNOLDS,
Attorney General of the
State of Wisconsin.

SUEL O. ARNOLD,
Special Counsel,
Attorneys for Defendants and Appellants.